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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

C. L. CARR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

## PETITION FOR CERTIORARI

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## QUESTION PRESENTED

WHETHER PREJUDICE NEED BE SHOWN BEFORE AN INDICTMENT IS DISMISSED AND A CONVICTION REVERSED WHEN THE UNITED STATES ATTORNEY APPOINTS, WITHOUT STATUTORY AUTHORITY, A GRAND JURY "AGENT" TO INVESTIGATE AND PERSONALLY PRESENT EVIDENCE TO THE GRAND JURY?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner, C. L. Carr, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 7, 1985.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Western District of Arkansas.

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 7, 1985. A timely petition for rehearing was denied on July 2, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether prejudice need be shown before an indictment is dismissed and a conviction reversed when the United States Attorney appoints, without statutory authority, a grand jury

"agent" to investigate and personally present evidence to the grand jury?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Const., Amend V:

No person will be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury..., nor be deprived of life, liberty, or property, without due process of law....

F. R. Crim. P. 6:

Set out in full in appendix.

## STATEMENT OF THE CASE

Petitioner C. L. Carr was the target of a grand jury investigation commencing on or about January 11, 1983. As a result of the grand jury investigation, an indictment was returned against petitioner and subsequently he was convicted in the United States

District Court for the Western District of Arkansas, for aiding and abetting the willful misapplication of bank funds in violation of 18 U.S.C. §§2 and 656. Jurisdiction in the District Court was proper pursuant to 18 U.S.C. §3231 and Rule 18 of the Federal Rules of Criminal Procedure.

At the grand jury proceedings, the United States Attorney, Asa Hutchinson appointed Gary Aaron, an agent of the Federal Bureau of Investigation, as agent of the grand jury. Mr. Aaron was to continue questioning the chief prosecution witness, Joel Tabor, and personally report his findings to the grand jury as an agent for the grand jury.

On February 29, 1984, Mr. Aaron did testify before the grand jury concerning the results of his interviews with Joel

Tabor. Thereafter, the grand jury issued the indictments against petitioner which led to his conviction.

At his trial, petitioner's counsel made an oral motion to dismiss the indictments on the grounds of prosecutorial misconduct and other grand jury improprieties. The motion was taken under submission and later denied.

After his conviction and sentencing, petitioner appealed to the United States Court of Appeals for the Eighth Circuit. Again, he raised the prosecutorial misconduct and other grand jury improprieties as grounds to dismiss the indictment and reverse the conviction.

In an opinion filed June 7, 1985, the Court of Appeals held that in order to dismiss the indictment and reverse the conviction, petitioner must first

show actual prejudice arising out of the appointment of the grand jury "agent." Since petitioner was unable to demonstrate actual prejudice, the court unheld the conviction.

Subsequently, petitioner filed a timely petition for rehearing with the Court of Appeals. This petition was denied on July 2, 1985.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICT'S WITH APPLICABLE DECISIONS OF THIS COURT.

Throughout its history, this Court has found certain instances in which a showing of actual prejudice was not a prerequisite to reversal of a conviction. See, e.g., Estes v. Texas, 381 U.S. 582 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); In re Murchison, 349 U.S. 133 (1955); Tumey

v. Ohio, 273 U.S. 570 (1927). In these cases, the procedure under scrutiny involved such a probability that prejudice would result that it was held to be inherently lacking in due process.

One such case, Turner v. Louisiana, supra, merits further discussion. In Turner, the petitioner was convicted for a murder committed during the course of a robbery. During the three day trial, two deputy sheriffs who were the main prosecution witnesses also had custody of the jury. As a result, the deputy sheriffs maintained close and continuous contact with the jurors. This Court held that, under such circumstances, the petitioner need not demonstrate specific, isolatable prejudice before a reversal of his conviction was warranted. Justice Stewart stated that "... it would be blinking reality not to

recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two ke, witnesses for the prosecution." Turner, 379 U.S. at 473.

Petitioner in this case, C. L. Carr, acknowledges that Turner dealt with trial impropriety. He strongly contends, however, that the facts in Turner closely parallel those in his case, and that Turner's rule applies in this instance.

In the course of the grand jury proceedings concerning petitioner, the United States Attorney, without statutory authority, appointed an "agent" to assist the grand jury in its investigation. This "agent" was to continue the questioning of the government's chief witness and to report the information gathered directly to the grand jury

in the form of testimony. The "agent" did testify before the grand jury on February 29, 1984. Subsequently, the grand jury issued an indictment against the petitioner.

Both petitioner's case and Turner involve similar material facts. First, a relationship between jury and jury-witness was created. The Turner jury-witness relationship was created by way of personal contact and petitioner's jury-witness relationship was created by way of an agency. Second, the witness was a key prosecution witness. The Turner witness testified from personal, first-hand knowledge. The petitioner's witness testified from information gathered from the chief prosecution witness.

The same inherent prejudice found by this Court in Turner is endemic to

petitioner's case. The grand jury would assuredly place greater weight upon the testimony of their "agent" or, understandably, even accept absolutely any findings of their "agent."

Actually, greater prejudice redounds in petitioner's case than in Turner. In Turner, the resulting prejudice depended upon the chemistry between the witnesses and the jurors. The amount of personal contact between the witnesses and the jurors might have prejudiced the state's case. Not so in petitioner's case where the agency created acted to fuse the witness with the jurors.

The effect of the agency, coupled with the fact that the information the "agent" testified to came from the chief prosecution witness, leads to one inexorable conclusion: the petitioner

suffered grave prejudice at the grand jury proceedings. This prejudice acted to undermine the salutory function of the grand jury.

Once a prosecution witness became its agent, no longer did the grand jury stand between the accuser and the accused. It became the accuser, thereby denying petitioner his fifth amendment right not only to indictment by a grand jury, but also to due process of law. As Chief Justice Taft stated:

> [t]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man...which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Not even the fact that Mr. Aaron was appointed the agent of a different grand jury from the one which returned the indictment against petitioner ameliorates the situation.

The reading of Mr. Aaron's appointment as grand jury "agent" planted the prejudicial seed in the second grand jury. His subsequent testimony brought the seed to fruition and tainted the indictment.

Had the Eighth Circuit properly applied the relevant precedents of this Court, the indictment against petitioner would have been dismissed and his conviction reversed. The appellate court's failure to utilize this Court's applicable decisions justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE BURDEN OF PROOF REQUIRED TO DISMISS AN INDICTMENT ON THE GROUNDS OF PROSECUTORIAL IRREGULARITY AT THE GRAND JURY PROCEEDINGS.

Rule 6 of the Federal Rules of Civil Procedure governs grand jury proceedings. Nowhere in its text does it provide for the appointment of a grand jury "agent." The appointment of a grand jury "agent" in petitioner's case without statutory authority, therefore, violates Rule 6 of the Federal Rules of Criminal Procedure.

No other federal appellate court has dealt exactly with the issue presented in petitioner's case. When faced with prosecutorial irregularity, however, the federal appellate courts have taken a stand regarding the burden of proof question.

The Fourth Circuit has addressed the question presented here in regard to unauthorized persons in the grand jury room. The Court held that a procedural violation of Rule 6(d) would require a dismissal of an indictment without a showing of prejudice by the accused. See United States v. Mechanik, 735 F. 2d 994 (4th Cir. 1984), reh'g on other grounds, 756 F. 2d 994 (4th Cir. 1985), cert. granted, Docket No. 84-1640 (June 17, 1985).

As in the above cited case, Rule 6 is unequivocal in its language. It provides no authority to appoint "agents" to the grand jury. Any such appointment violates the rule.

As stated by the Mechanik court, "[r]equiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that

the rule provides." Mechanik, 735 F. 2d at 139. Indeed, secrecy constitutes the cornerstone of any grand jury proceeding. The only true way to measure the prejudicial effect of the appointment of an "agent" to the grand jury would be to poll the grand jury members, an unwise practice at best.

Requiring an individual to demonstrate actual prejudice arising from procedural irregularities gives federal prosecutors, in effect, a green light to abuse the grand jury process. Without access to the proceedings or persons composing the grand jury, establishing actual prejudice becomes a Herculean task.

Rather than allow the prosecutor to skirt the protection of Rule 6 with a bald assertion of "harmless error," require the government to prove that no

prejudice resulted from the procedural impropriety. Prosecutors clearly have greater access to such proof than the accused. Common sense and sound jurisprudence mandate this approach.

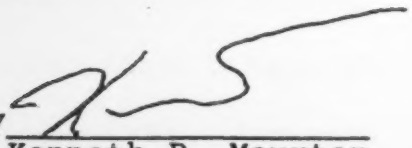
## CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully

Submitted,

BALL, MOURTON &
ADAMS

By 

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ATTORNEYS FOR
PETITIONER

## CERTIFICATE OF SERVICE

I, Kenneth R. Mourton, one of the attorneys of record for the Petitioner, C. L. Carr, state on oath that I have on this 29th day of August, 1985, served a copy of the above and foregoing Petition For a Writ of Certiorari upon the Respondent, by depositing a copy thereof in the U.S. Mail, postage prepaid, to Mr. Asa Hutchinson, P.O. Box 1524, Fort Smith, Arkansas 72902; and the Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530.

Kenneth R. Mourton